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In the Supreme Court

OF THE

United States

October Term, 1938

No. 213

Pacific Telephone and Telegraph Company (a corporation),

Appellant,

vs.

[illegible], Fred E. Stewart, Richard E. Collins, William G. Bonelli and Harry B. Riley, as members of the State Board of Equalization of the State of California, State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California,

Appellees.

Appeal from the District Court of the United States for the Northern District of California.

REPLY BRIEF FOR APPELLANT.

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The answering brief of appellees and the brief of the Attorney General of the State of Washington as *amicus curiae* make pertinent a short further comment.

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1. Brief of Appellees.

The appellees do not question the doctrine of the *Helson* case (279 U. S. 245); their brief recognizes that a direct state excise tax on the use of an instrumentality of interstate commerce (which the telephone equipment in this case unquestionably is—Findings 8, 39; R. 87-88, 100; and see *Cooney* v. *Mountain States Tel. Co.* (1935), 294 U. S. 384) is a direct burden on interstate commerce and is invalid for that reason. The appellees' attempt is to distinguish the *Helson* case by urging that the tax in the instant case applies to some separable intrastate transaction affecting the property.

We reiterate that there is no storage or withdrawal from storage of the **specfic order equipment.** Appellees claim that a storage occurs in the moments when the property is temporarily set down in the course of unloading or installation (Stipulation of Facts, par. 18, R. 70-71; Finding 26, R. 95-96). In this respect the facts stipulated and found are that

> "There is no holding, in any warehouse, storeroom or other like place of deposit, of any of the specific order equipment after the termination of the interstate shipment and the plaintiff's receipt thereof; * * * There is no retention or holding of any of said equipment except such as occurs in the ordinary and efficient course of transporting said equipment to its ultimate destination and installing it as physically connected parts of plaintiff's telephone and telegraph plant."

In no practical or reasonable sense is there any "storage" or "withdrawal from storage" in these necessary and incidental interruptions of movement. But even if those terms could be given such a meaning, it is well settled that a momentary storage comprising a mere temporary interruption of the course of a non-taxable interstate event does not itself acquire an intrastate character and become taxable on

that account (*Carson Petroleum Co.* v. *Vial* (1929), 279 U. S. 95; *Champlain Co.* v. *Brattleboro* (1922), 260 U. S. 366).

Appellees suggest, without argument or citation of authority, that the installation of the equipment may bear the tax. The answer is that the statute does not tax installation. But if the statute did purport to tax the installation of the property here involved, it would be invalid in that respect. A tax on installation for use, as this Court has held, is in effect a tax upon the use itself, and if permitted would defeat the ends of the constitutional protection. This Court has held that the maintenance of interstate telephone and telegraph lines and the making of repairs in the operation of interstate pipe lines—necessarily involving the installation of repair parts and improvements—are not separable intrastate activities authorizing the imposition of a state excise tax. In *Ozark Pipe Line* v. *Monier* (1925), 266 U. S. 555, the State of Missouri sought to justify a franchise tax on a company engaged in the operation of an interstate pipe line by pointing to a number of activities of the company claimed to be of an intrastate character. These activities included the maintenance and operation of telephone and telegraph lines and the purchase of supplies and equipment therefor, and the repair, by use of material and labor, of the pipe line (266 U. S. 559, 565)—necessarily including the installation of parts. This Court held the tax invalid, saying that the activities and property in question (266 U. S. 565)

> "were the means and instrumentalities by which that [interstate] business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected."

In commenting on the *Ozark* case in *Atlantic Lumber Co.* v. *Comm'r* (1936), 298 U. S. 553, this Court said of these activities (p. 557):

> "Neither property nor activities were anything more than aids to the operation of the pipe line; and together with that line they combined to constitute in practical effect an instrumentality of that commerce. Thus, the burden of the tax which the State imposed fell upon interstate transportation immediately and directly, * * *."

As regards installation the case is directly analogous to the loading cases. Installation for interstate use, like loading for interstate shipment, is essentially the act of putting the property in position for interstate activity, and is exclusively in furtherance of the interstate commerce. It is settled that a state cannot tax such a closely related incident of interstate commerce as the loading of goods in position for interstate shipment (*Puget Sound Co.* v. *Tax Commission* (1937), 302 U. S. 90; *Hughes Bros. Co.* v. *Minnesota* (1926), 272 U. S. 469), even where the work is done by a separate concern hired for the purpose.

With respect to **stand-by facilities**, little need be added to what has been said on this subject in our opening brief. Appellees' answer seems to be that this property is part of the general mass of property in the state and hence is subject to the state's general taxing laws. But the performance of the stand-by function, as the facts show (Finding 33; R. 98) and as the trial court held (R. 49, 79), **is use of the property in the interstate-intrastate business**; and while all the rest of appellant's plant in use is part of the general mass of property in the state and may be subjected to property taxes, yet the state may not tax **the use of that plant in interstate commerce,** nor any part of the privilege of intermingled interstate and intrastate use **without apportioning the tax to the amount of intrastate use.**

The rest of appellees' argument is devoted to the claim that the tax in question is valid because it applies to the intrastate use of the property, and to their attempt to distinguish *Cooney* v. *Mountain States Tel. Co.* (1935), 294 U. S. 384.

The appellees' statement that the tax falls upon the intrastate use alone is simply opposed to the facts. The interstate and intrastate business of appellant are inseparably intertwined (Finding 7; R. 87); the property involved is wholly used in inextricably intermingled interstate and intrastate commerce (Findings 2, 7, 8, 9, 16, 39; R. 85, 87, 88, 90, 100); and appellees have demanded the tax for the storage, use, or other consumption **of all of the property at the rate of three per cent of the purchase price of all of it, without any apportionment for the division of use between interstate and intrastate commerce.** Since there is no transaction separable from the intermingled use, and since the tax necessarily, therefore, falls on the intermingled use, and since the measure of the tax is unapportioned by any allocation of the use, it is plain that the tax is not laid upon the intrastate use alone; and appellees' mere assertion to the contrary does not change the fact.

Far from showing a situation different from that presented in the *Cooney* case, appellees show that the cases coincide. The same argument that appellees now make was made in that case and rejected by this Court (294 U. S. 388):

> "Appellants contend that the taxes are imposed solely upon intrastate commerce and do not burden interstate commerce. They insist that the taxes are laid upon the intrastate business measured by the number of telephones in intrastate use."

The argument in that case was answered, as the facts of this case answer it, by showing that since the property was used indiscriminately in both kinds of commerce, the unapportioned tax fell indiscriminately on both kinds of commerce.

As stated by this Court in *Western Union Tel Co.* v. *Kansas* (1910), 216 U. S. 1, 27,

> "the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce."

Hence it does not appear here that the tax is imposed solely on account of the intrastate business, and the first of the four requisites of constitutionality listed in the *Cooney* case [1] is lacking. The second requirement is likewise unfulfilled, as the facts stipulated and found amply show. Appellant is compelled to purchase more property by reason of the interstate business than it would purchase if it were engaged in intrastate commerce alone (Finding 41; R. 101). The tax is a fixed percentage of the purchase price of the property. It follows that the amount of the tax is greater by reason of the interstate business done.

In *Raley & Bros.* v. *Richardson* (1924), 264 U. S. 157, relied on by appellees (Brief of Appellees, pp. 16-18), the interstate and intrastate businesses were plainly separate, and the statute in question had been judicially construed to apply to intrastate business alone.

2. Brief of Attorney General of Washington et al., Amici Curiae.

The contentions of the Attorney General of the State of Washington which are material to the case have already

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[1] "Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter, that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business" (294 U. S. 393).

been answered. The rest of his arguments, comprising an attempt to show that the California sales and use taxes are mutually complementary, and that the use tax is non-discriminatory and cannot result in multiple taxation, are not material because the burden of the tax on interstate commerce is direct; but even if material they would fail because they are founded on misconceptions of the California taxing statutes.

It is not correct that the sales and use taxes are both paid by the purchaser (Brief of *Amici Curiae,* p. 14). The California Retail Sales Tax Act of 1933 (Cal. Stats. 1933, p. 2599, ch. 1020) imposes upon retailers, for the privilege of selling tangible personal property at retail, a tax equal to three per cent of the gross receipts from their retail sales.[2] In *National Ice & Cold Storage Co.* v. *Pacific Fruit Express Co.* (1938), 95 Cal. Dec. 442;[3] 79 P. (2d) 380, the Supreme Court of California held that the California sales tax is a tax on the retailer and not on the purchaser, and that the provisions for passing the tax on to the purchaser[4] were invalid except in so far as the latter might consent thereto, either expressly or impliedly (95 Cal. Dec., pp. 447-448; 79

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[2] "SEC. 3. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of * * * three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State * * *" (Cal. Stats. 1933, p. 2600, as amended with respect to the rate, Cal. Stats. 1935, p. 1253).

[3] The citation is to "California Decisions," the unofficial advance publications of the opinions of the Supreme Court of California. The case has not yet appeared in the official reports.

[4] "SEC. 4. In any case where tangible personal property is sold at retail under a contract made prior to the effective date of this act, which specifies and fixes the sale price and such sale is taxable under this act, the seller may add the tax imposed by this act to the sale price and collect it from the buyer" (Cal. Stats. 1933, p. 2600).

"SEC. 8½. The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done * * *" (Cal. Stats. 1933, p. 2602).

P. (2d) 384). It is merely optional with the retailer whether he shall attempt to reimburse himself from the consumer; he may waive the right (*Roth Drug, Inc.* v. *Johnson* (1936), 13 Cal. App. (2d) 720, 736; 57 P. (2d) 1022, 1029, approved by the Supreme Court of California in the case last cited). The Use Tax Act, on the other hand, makes the tax a direct obligation of the consumer, who **must** pay the tax—to the retailer if the latter maintains a place of business in California, otherwise directly to the State Board of Equalization.[5]

Obviously, the California sales and use taxes are not mutually complementary; moreover, the California tax scheme creates a heavier deterrent to interstate commerce than to intrastate commerce, because the consumer cannot escape the three per cent use tax on his purchases interstate, but may escape the three per cent sales tax on his purchases intrastate.

Returning to the Washington Attorney General's brief: The point is made that the sales and use taxes, construed together, are no more burdensome to interstate commerce than is the ordinary property tax. Apart from the discriminatory character of the use tax shown above, the Attorney General's point has no significance except in cases where the impact of the tax upon interstate commerce is indirect. In our opening brief we have already shown that the tax in this case falls **directly** upon the whole interstate-intrastate use.

The Washington Attorney General's argument that the California use tax cannot lead to multiple taxation is untenable. In many situations property might be subjected to sales taxes, and to use taxes as well, before arrival in California, and then be subjected to a use tax in that state.

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[5] California Use Tax Act of 1935, secs. 6 and 7, Cal. Stats. 1935, p. 1300; Appendix to Brief for Appellant, pp. ii-iv.

It is obvious that the cumulative effect of all such taxes creates a discriminatory impediment to the commerce in goods originating outside California, not felt by goods originating within California and subjected only to a sales tax. This particular discriminatory feature, of course, might have been obviated by a provision in the Use Tax Act for a *pro tanto* exemption equal to the amount of sales and use taxes paid in other states. In his brief (p. 18), the Washington Attorney General seems to suppose that such a provision exists in the California statute, but such is not the fact. Such a provision does exist in the Washington Compensating Tax Act which was before this court in *Henneford* v. *Silas Mason Co.* (1937), 300 U. S. 577, and was relied upon by this court as establishing the non-discriminatory character of the tax; its absence in the California statute, we submit, brings about the very possibility of multistate taxation which leads to invalidity under the commerce clause.

On pages 21 and 22 of his brief, the Washington Attorney General attributes to us a contention which we have nowhere made; nor have we cited the case said to have been cited by us. In these circumstances the purported answers to a non-existent contention are beside the point.

We respectfully submit that the Brief of Appellees and the Brief of *Amici Curiae* present no answer to the points made in our opening brief.

Dated, Washington, D. C., Dec. 9, 1938.

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